B. Employer Discrimination in Conditions of Employment

1. Proof of Discriminatory Motivation

In Wright Line, a Div. of Wright Line,[56] the Board formally set forth a test of causation, based on an analysis akin to that used by the Supreme Court in Mt. Healthy[57] for all cases alleging violations of section 8(a)(3) or violations of section 8(a)(1) turning on employer motivation. In adopting what it referred to as the Mt. Healthy test, the Board stated tht it first shall require the General Counsel to make a prima facie showing sufficient to support the inference that an employee's protected conduct was a motivating factor in the employer's disciplinary action. Once this is established, the burden will then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

After discussing the distinction between pretext and dual motive, the "in part" test, and the advent of the "dominant motive" test and the law of the

[56] 251 NLRB No.150 (Chairman Fanning and Members Penello and Truesdale, Member Jenkins concurring).

[57] Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274 (1977).

courts, the Board examined the Mt. Healthy case, where an untenured teacher had brought suit against the school board, alleging that it had wrongfully refused to renew his contract. The district court found that of the two reasons cited by the school board for its action, one involved unprotected conduct while the second was clearly protected by the first and fourteenth amendments. The district court reasoned that since protected activity had played a substantial part in the school board's decision, its refusal to renew the contract was improper and the teacher was, therefore, entitled to reinstatement and backpay. After the court of appeals affirmed, per curiam, the Supreme Court reversed, in a unanimous opinion, rejecting the lower court's application of such a limited "in part" test and ruling that the school board must be given an opportunity to establish that its decision not to renew would have been the same if the protected activity had not occurred. Thus, in the Board's view, the Court established the two-part test, described above, to be applied in a dual-motivation context.

The Board concluded that Mt. Healthy represents a rejection of the "in part" test which stops with the establishment of a prima facie case or a consideration of an improper motive. It also found that the "dominant motive" test fared no better because Mt. Healthy shifted the burden of proof to different parties. Under the "dominant motive" test, the General Counsel not only has to establish a prima facie showing of unlawful motive, but he is also required to rebut the employer's asserted defense by demonstrating that the discharge would not have taken place in the absence of the employees' protected activities. However, under Mt. Healthy, after the General Counsel establishes a prima facie case of employer reliance on protected activity, the burden shifts to the employer to demonstrate that the decision would have been the same in the absence of protected activity. In the Board's view, this distinction is a crucial one since the decision as to who bears this burden can be determinative.

After considering the legislative history of the Act and the Supreme Court's

decision in Great Dane [58], the Board concluded that the shifting burden process in Mt. Healthy was consistent with the process envisioned by Congress and the Supreme Court to resolve discrimination cases. Further, it pointed out that, although not couched in the language of Mt. Healthy, this is the same process that the Board has sought to use in analyzing such issues. Thus, the Board's decisional process traditionally has involved, first, an inquiry as to whether protected activities played a role in the employer's action and, if so, a subsequent inquiry as to whether any legitimate business reason asserted by the employer is sufficiently proven to be the cause of the discipline to negate the General Counsel's showing of prohibited motivation.

Perhaps most important for its purposes is the fact that the Mt. Healthy procedure accommodates the legitimate competing interests inherent in dual-motivation cases, while at the same time serving to effectuate the policies and objectives of section 8(a)(3) of the Act.

[58] N.L.R.B. v. Great Dane Trailers, 388 U.S. 26 (1967).

Under this test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision, while the employer is provided with a formal framework within which to establish that the discipline or other action would have occurred absent the employee's protected activities. Further, the Board found it to be of substantial importance that its explication of this test of causation will serve to alleviate the confusion which now exists at various levels of the decisional process by providing litigants and the decisionmaking bodies with a uniform test to be applied in 8(a)(3) cases. Finally, the Board recognized that inherent in the adoption of the Mt. Healthy test is its recognition of the advantage of clearing the air by abandoning the "in part" language in expressing its conclusion as to whether the Act was violated without repudiating the well-established principles and concepts which have been applied in the past.

In applying the Mt. Healthy test to the facts in the instant case, the Board found that the General Counsel had made a prima facie showing that the employee's union activity was a motivating fact in the employer's decision to discharge him, and that the employer failed to demonstrate that it would have taken the same action against the employee in the absence of his engaging in union activities. For these reasons, they agreed with the administrative law judge's finding that the employer violated section 8(a)(3) of the Act.

Concurring Member Jenkins was willing to apply the shifting burden-of-proof standard his colleagues adopted in this case. Although finding that this standard may suffice for most cases, he stated that there may remain a residue, perhaps small, of cases of mixed motive or cause, where the purposes are so interlocked that it is not possible to point to one of them as "the" cause. Where the evidence does not permit the isolation of a single event or motive as the cause of the discharge, Member Jenkins concluded that the unlawful motive must be deemed to be part of the

cause of discharge, and the discharge is unlawful. In his view, it is fair that the party who created this situation, in which isolation of a single cause is impossible, bear the burden created by the venture into an area prohibited by the Act. Member Jenkins therefore found that the "in part" standard as distinguished from the "but for" and "dominant motive" tests is the only criterion which will effectuate the purposes of the statute. Noting that the legislative hsitory shows plainly that Congress itself struck this balance, he read Mt. Healthy as also in effect adopting this standard. His only reservation now is the way in which the shifting burden-of-proof standard may be applied to prevent unlawful conduct. If experience shows it to be inadequate in application, he believed that modification may be required.